

Remarks

The Applicant would first like to thank the Examiner for returning the message left by Applicant's attorney on June 4, 2004. The Applicant, however, wishes to again request that two of the six groups listed as patentably distinct by the Examiner be allowed to proceed in the current application. As stated in the message left by Applicant's attorney, the other four would accordingly be cancelled responsive to the restriction requirement. Again, inventions labeled Groups V and VI in the Office Action mailed May 5, 2004 wholly consist of claims previously allowed by the Examiner. For this reason, the Applicant requests that both groups be allowed.

Considering the history of this application, the Examiner's unwillingness to allow two of the listed groups to proceed as one application seems peculiar at best. On January 27, 2000, the original patent application was filed. On August 15, 2001, the Examiner issued the first Office Action in which all claims were rejected (1-39 at the time). After subsequent amendments, the Examiner issued a second Office Action of January 30, 2002. Again, all claims (1-39) were rejected. In response to Applicant's arguments, claims 33-39 were allowed in the Examiner's third Office Action, while all others were either rejected or objected to. After the Applicant amended some of the rejected claims and added claims 40-49, a fourth Office Action was issued. In that Action, the Examiner allowed claims 40-49, meaning that claims 33-49 were all deemed allowable at that time. All other claims were rejected in the fourth Office Action. In response, the Applicant made various amendments, cancelled one claim and added claims 50-54. The fifth and current Office Action in response, however, stated that all claims were being subject to a restriction requirement. In sum, the Examiner has issued a total of five Office Actions and has examined all claims on the merits

three or four times. During the course of the previous four actions, the Examiner allowed claims 33-49 of the current fifty-three claims. Group V (as listed by the Examiner) consists of claims 33-39. Group VI consists of claims 47-49. It is readily apparent that the claims of Groups V and VI have already been thoroughly examined and allowed. The Applicant fails to understand why this history does not allow for Groups V and VI to proceed in the current application.

The requisite criteria for a restriction requirement as stated by the Manual of Patent Examining Procedure make the restriction requirement even more puzzling. According to the MPEP, “There are two criteria for a proper requirement for restriction between patentably distinct inventions: (A) The inventions must be independent . . . or distinct as claimed . . . ; and (B) There must be a *serious burden on the examiner* if the restriction is required” § 803.01 (8th ed. 2001) (emphasis added). The Manual also states that “[b]efore making a restriction requirement *after the first action on the merits*, the [E]xaminer will consider whether there will be a serious burden if restriction is not required.” § 811 (8th ed. 2001) (emphasis added). The restriction requirement makes no showing of any burden that will be suffered by the Examiner in allowing the examination of all of the claims, much less the already allowed Groups V and VI.

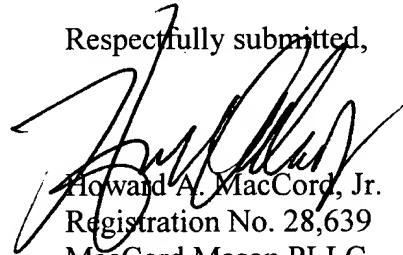
Furthermore, the odd timing of the restriction requirement itself seems to lend itself towards the allowance (or at least continued examination) of groups V and VI. While the Applicant realizes that a restriction requirement may be made at any time necessary before the action is made final, the Applicant believes that “the [E]xaminer should make a proper requirement as early as possible in the prosecution, in the *first* action if possible, otherwise, as soon as the need for a proper requirement develops.” MPEP § 811 (8th ed. 2001) (emphasis

added). No change in the application warranted a restriction requirement so late in the process (i.e. the *fifth* office action).

The above analysis leads to the conclusion that allowance of Groups V and VI is, at the very least, entirely reasonable. The Applicant respectfully requests that such groups be allowed and that groups I through IV be cancelled.

If the Examiner does not so choose, the Applicant elects Group V (consisting of claims 33-39) with traverse.

Respectfully submitted,


Howard A. MacCord, Jr.
Registration No. 28,639
MacCord Mason PLLC
P. O. Box 2974
Greensboro, NC 27402
(336) 273-4422

Date: June 17, 2004
File No.: 8550-004

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